No. 1401

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

CASE No. 23,748.

ESTATE OF EDWARD F. PIPE, Deceased, NETTIE M. PIPE, Executrix,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

APPENDIX TO BRIEF.

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NETTIE M. PIPE, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Statute.

Internal Revenue Code of 1939.

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * * * *

(e) BEQUESTS, ETC., TO SURVIVING SPOUSE.—

(1) ALLOWANCE OF MARITAL DEDUCTION.—

(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) Life Estate or Other Terminable Interest.—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii))—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * * *

(F) Trust with Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent in trust, if under the terms of the trust the surviving spouse is entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire corpus free

of the trust (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse—

(i) the interest so passing shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for the purposes of subparagraph (B) (i), be considered as passing to any person other than the surviving spouse.

This paragraph shall be applicable only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * * * *

Regulations.

Regulations 105—Estate Tax

SEC. 81.47a. *Bequests, etc., to surviving spouse.*—

(a) *Allowance of marital deduction.* In the case of the estate of a citizen or resident of the United States dying after December 31, 1947, there may be deducted the value of any property interest (except as otherwise provided in sections 81.47b and 81.47d) which passed from the decedent to his surviving spouse. Such deduction is hereinafter referred to as the "marital deduction."

* * * * * * *

Regulations.

In order to obtain the marital deduction with respect to any property interest the executor must establish the following facts:

(1) That the decedent was survived by his spouse;

(2) That such property interest passed from the decedent to such spouse (see paragraphs (b) to (h), inclusive, of this section);

(3) That such property interest is a "deductible interest" (see section 81.47b);

(4) The value of such property interest (see section 81.47c); and

(5) The value of the "adjusted gross estate" (see section 81.47d).

* * * * * *

(b) *Definitions*—(1) *Passed from the decedent.* As used in this and the three succeeding sections, the expressions "passed from the decedent", "passed from the decedent to his surviving spouse", and "passed from the decedent to a person other than his surviving spouse", have the meanings stated in this paragraph. Except as otherwise indicated in subparagraphs (2) and (3) of this paragraph, the following rules are applicable in determining the person to whom any property interest "passed from the decedent":

(i) Property interests devolving upon any person (or persons) as surviving coowner with the decedent under any joint ownership wherein the right of survivorship existed are considered as having passed from the decedent to such person (or persons).

(ii) Property interests at any time subject to decedent's power to appoint (whether alone or in conjunction with any person) are considered as

having passed from the decedent to the appointee under his exercise of the power, or, in case of release or nonexercise, as having passed from the decedent to the taker in default of exercise.

(iii) The dower or curtesy interest (or statutory interest in lieu thereof) of the decedent's surviving spouse is considered as having passed from the decedent to such spouse.

(iv) In the case of insurance upon the life of the decedent, the proceeds are considered as having passed from the decedent to the person who, at the time of the decedent's death, was entitled to receive such proceeds.

(v) Subject to the rules stated in subdivisions (i) to (iv), inclusive, of this subparagraph, any property interest transferred during life, bequeathed or devised by the decedent, or inherited from the decedent, is considered as having passed to the person to whom he transferred, bequeathed, or devised such interest, or to the person who inherited such interest from him.

* * * * * *

(2) *Passed from the decedent to his surviving sponse.* In general, the definition stated in subparagraph (1) of this paragraph is applicable in determining the property interests which "passed from the decedent to his surviving spouse". Special rules are provided, however, in the case of certain trusts with power of appointment in the surviving spouse, in the case of proceeds held by the insurer under a life insurance, endowment, or annuity contract, with power of appointment in the surviving spouse, and in the case of certain interests passing by will (whether or not in trust) from decedents dying after December 31, 1947, and on or before April 2, 1948.

* * * * * *

The following are given as illustrative; (i) A property interest bequeathed in trust by H (the decedent) is considered as having passed from him to W (his surviving spouse) if the trust income is payable to W for life and upon her death the corpus is distributable to her executors or administrators, or if W is entitled to the trust income for a term of years following which the corpus is to be paid to W or her estate, or if the trust income is to be accumulated for a term of years or for W's life and the augmented fund paid to W or her estate, or if the terms of the trust meet the requirements of paragraph (c) of this section; * * *.

* * * * * * *

(c) *Trust with power of appointment in surviving spouse.* In the case of property interests which passed from the decedent to a trust, the terms of which satisfy the five conditions stated in this paragraph, the expression "passed from the decedent to his surviving spouse" embraces not only the beneficial interest therein of such spouse but also the interest therein subject to her power to appoint. (As to the treatment of trusts not meeting such conditions, see paragraph (b)(2) of this section.) The five conditions which must be satisfied by the terms of the trust are as follows:

(1) The surviving spouse must be entitled for life to all the income from the corpus of the trust.

(2) Such income must be payable annually or at more frequent intervals.

(3) The surviving spouse must have the power, exercisable in favor of herself or of her estate, to appoint the entire corpus free of the trust.

(4) Such power in the surviving spouse must be exercisable by such spouse alone and (whether exercisable by will or during life) must be exercisable in all events.

(5) The corpus of the trust must not be subject to a power in any other person to appoint any part thereof to any person other than the surviving spouse.

In determining whether the above-stated conditions (1) to (5), inclusive, are satisfied by the terms of the trust, regard is to be had to the applicable provisions of the law of the jurisdiction governing the administration of the trust. * * *.

* * * * * *

SEC. 81.47b. *Nondeductible interests*—(a) *General.*

The property interests which passed from the decedent to his surviving spouse (as set forth in section 81.47a) fall within two general categories: (1) those with respect to which the marital deduction is authorized, and (2) those with respect to which the marital deduction is not authorized. Such categories are hereinafter referred to as "deductible interests" and "nondeductible interests", respectively. As to the several classes of "nondeductible interests" see paragraphs (b) to (g), inclusive, of this section.

* * * * * *

(d) *Interest in property which another person may possess or enjoy.* Section 812(e)(1)(B) provides that no marital deduction shall be allowed with respect to certain property interests (referred to generally as "terminable interests") which passed from the decedent to his surviving spouse, in case—

(1) An interest in the same property passed at any time (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such spouse (or the estate of such spouse), and

(2) By reason thereof, such person (or his heirs or assigns) may possess or enjoy any part of such property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse.

The foregoing provision is applicable only where interests in the same property passed from the decedent both to his surviving spouse, and to some other person (for less than an adequate and full consideration in money or money's worth), and is applicable irrespective of whether both such interests passed from the decedent at the same time or under the same instrument. Under such circumstances, if the other person to whom an interest passed may, by reason thereof, possess or enjoy any part of the property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse, the latter interest is a "non-deductible interest".

* * * * * *

In the following examples it is assumed that the property interest which passed from the decedent to a person other than his surviving spouse was not for an adequate and full consideration in money or money's worth:

* * * * * *

(ii) H devised real property to W ~~for~~ life, and created in W a power, exercisable by will, to appoint the remainder interest to any person. In default of appointment by W, the remainder interest was to go to A and his heirs. Assuming that under the local law W did not take the real property as absolute owner, nor as trustee of a trust meeting the requirements of section 81.47a(c), the interest which passed from H to W is a "nondeductible interest" since such interest will terminate upon her death and A (or his heirs or assigns) may thereafter possess or enjoy the property.

[R. 1-2]

PROCEEDINGS.

Estate of Edward F. Pipe, Deceased, Nettie M. Pipe, Executrix, Petitioner, *vs.* Commissioner of Internal Revenue, Respondent.	Docket No. 39831.

Docket Entries.

Appearances:

For Petitioner: Edmund W. Pavenstedt, Esq.,
For Respondent: Rigmor O. Carlsen, Esq.

3/ 5/54—Reassigned from Judge Opper, (Div. 14), to Judge Fisher, (Div. 15).
7/21/54—Reassigned from Judge Fisher to Judge Opper.

1952

Apr. 7—Petition received and filed. Taxpayer notified. Fee paid.
" 8—Copy of petition served on General Counsel.
" 17—Request for hearing at New York City filed by taxpayer. 4/24/52—Granted.
May 28—Answer filed by General Counsel.
June 3—Copy of Answer served on Taxpayer, New York, N. Y.

1953

Feb. 6—Hearing set March 30, 1953, New York, N. Y.
Mar. 30—Hearing had before Judge Opper on the merits, Stipulation of Facts with attached exhibits 1-A and 2-B filed. Briefs due 5/14/53; Replies due 5/29/53.

Apr. 16—Transcript of Hearing 3/30/53 filed.
May 11—Motion for extension to June 15, 1953 to file brief filed by General Counsel. 5/14/53—Granted.
May 15—Stipulation to correct transcript filed. Granted.
June 10—Motion for extension to August 17, 1953 to file brief filed by General Counsel. 6/12/53—Granted.
" 17—Motion for extension to Sept. 30, 1953 to file reply brief filed by taxpayer. 6/19/53—Granted.
" 25—Brief filed by taxpayer.
Aug. 17—Motion for extension to Aug. 27, 1953 to file brief, filed by General Counsel. 8/19/53—Granted.
" 27—Brief filed by General Counsel.
" 28—Copy of brief served on General Counsel.

1954.

Oct. 22—Opinion filed, Judge Opper, Decision will be entered under Rule 50. Copy served.
Nov. 19—Motion for rehearing with attached memorandum in support thereof filed by petitioner. 11/23/54—Denied.

1955

Mar. 18—Agreed computation filed.
" 21—Decision entered, Judge Opper, Div. 14.
June 15—Petition for Review by U. S. Court of Appeals for the Second Circuit with assignments of error filed by petitioner.
" 15—Proof of service filed.

[R. 3-12]

Petition.

THE TAX COURT OF THE UNITED STATES.

ESTATE OF EDWARD F. PIPE, Deceased, NETTIE M. PIPE, Executrix, Petitioner, *against* COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 39831.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols UNY:COMF:PS) dated January 30, 1952, and as a basis of its proceeding alleges as follows:

1. The petitioner is the duly appointed, qualified and acting Executrix of the Estate of Edward F. Pipe, deceased, who died on September 20, 1948. The petitioner was appointed Executrix by the Surrogate's Court of Westchester County, State of New York, on November 10, 1948. The petitioner's address is 18 Midland Avenue, White Plains, New York. The Federal estate tax return of the decedent was filed with the Collector of Internal Revenue for the Fourteenth District of New York on November 10, 1949.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on January 30, 1952.

3. The tax in controversy is an estate tax in the amount of $19,310.29.

4. The determination of the tax set forth in the said notice of deficiency was based upon the following errors:

(a) Respondent erred in determining that bequests to the surviving spouse in the amount of $217,429.84 did not qualify for deduction under Section 812(e) of the Internal Revenue Code, and consequently erred in failing to allow as a deduction from the gross estate of the decedent under Section 812(e) of the Internal Revenue Code the amount of $141,473.55, representing the marital deduction for bequests to the surviving spouse of the decedent.

(b) Respondent erred in failing to allow as a deduction from the decedent's gross estate a reasonable amount of administration expenses and attorneys' fees in addition to that claimed in the return which has or will be incurred, including the additional amount of expense in determining the estate tax liability.

(c) Respondent erred in failing to allow credit for a voluntary payment of additional estate tax amounting to $2,551.69.

5. The facts upon which the petitioner relies as the basis for this proceeding are, upon information and belief, as follows:

(a) Decedent was at the date of his death a resident of the United States.

(b) The last will and testament of the decedent was admitted to probate by the Surrogate's Court of Westchester County, State of New York, on November 10, 1948.

(c) In the Federal estate tax return of the decedent, the petitioner elected to have the gross estate of the decedent valued as of September 20, 1949, as authorized by Section 811(j) of the Internal Revenue Code.

(d) Decedent in Article THIRD of his last will and testament provided as follows:

"THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my 'residuary estate', I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.

"I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property."

(e) The value at the optional valuation date of the property passing under Article THIRD of the decedent's will was $217,429.84.

(f) The entire value of the property passing under Article THIRD of the decedent's will was included in the decedent's gross estate.

(g) The estate of the decedent has necessarily incurred and will necessarily incur additional attorneys' fees and administration expenses, including the expense of the controversy involved herein, the amount of which has not presently been determined.

(h) On February 16, 1950, the petitioner made to the Collector of Internal Revenue for the Fourteenth District of New York a voluntary additional payment of estate tax amounting to $2,551.69.

WHEREFORE, the petitioner prays that this Court may hear this proceeding and disallow the said alleged deficiency to the extent of $19,310.29 and grant such other and further relief as may be justified in the premises.

/s/ EDMUND W. PAVENSTEDT,
Counsel for Petitioner,
14 Wall Street,
New York 5, New York.

Petition.

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

NETTIE M. PIPE, being duly sworn says that she is the Executrix of the Estate of EDWARD F. PIPE, the petitioner named above, and as such is authorized to sign and verify the foregoing petition; that she has read the foregoing petition or had the same read to her and is familiar with the statements contained therein, that the statements contained therein are true, except those stated to be on information and belief, and that those she believes to be true.

/s/ NETTIE M. PIPE.

Subscribed and sworn to before me
this 1st day of April, 1952.

/s/ HARRY KLINGER

HARRY KLINGER
Notary Public, State of New York
No. 60-7304700
Qualified in Westchester County
Term expires March 30, 1954

(NOTARIAL SEAL)

Exhibit A, Attached to Petition.

U. S. TREASURY DEPARTMENT
Office of Internal Revenue Agent in Charge
341 Ninth Avenue,
New York 1, N. Y.

JAN 30 1952

UNY:CONF:PS.

Estate of Edward F. Pipe,
Mrs. Nettie M. Pipe, Executrix,
18 Midland Avenue,
White Plains, New York

Dear Mrs. Pipe:

You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of $21,861.98, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, WASHINGTON 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office for the attention of UNY:CONF:PS. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest,

since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner,

By JOHN A. VEIT,
Internal Revenue Agent in Charge.

Enclosures:

Statement
Form 1276
Agreement Form

PS/PL.

Estate of Edward F. Pipe.
Date of Death—Sept. 20, 1948.

STATEMENT

	Liability	Assessed	Deficiency
Estate Tax	$34,491.09	$12,629.11	$21,861.98

In making this determination of the Federal estate tax liability of the above-named estate, careful consideration has been given to the report of examination, a copy of which was transmitted to you on April 6, 1950; to the protest filed on May 3, 1950; and to the statements made at the conferences held on June 8, 1950, January 12th and August 21, 1951.

A copy of this letter and statement has been mailed to your representative, White and Case, 14 Wall Street, New York 5, New York, in accordance with the authority contained in the power of attorney executed by you.

Exhibit A, Attached to Petition.

ADJUSTMENTS TO NET ESTATE

Net estate for basic tax as disclosed by return	$ 32,092.31
Additions to value of net estate and decreases in deductions:	
Stocks and Bonds	3.55
Transfers During Decedent's Life	18,758.93
Marital Deduction	59,982.50
Net estate for basic tax as adjusted	$110,837.29
Net estate for additional tax as adjusted	$150,837.29

EXPLANATION OF ADJUSTMENTS

Stocks and Bonds:

	Returned	Determined
Item 15	$ 4,178.63	$ 4,190.18
Item 22: Dividend	8.00	0.00

Item 15 is determined to be worth $4,190.18 as of the optional valuation date.

The dividend under Item 22 as returned is eliminated from the gross estate as same does not represent includible property.

Transfers During Decedent's Life:

	Returned	Determined
Item 1	$ 7,850.13	$17,230.01
Item 2	7,850.13	17,229.18

The value of the joint and survivorship annuity contract with the Travelers Insurance Co. No. 2274811 is determined to be $17,230.01 and the value of the similar policy issued by the Connecticut General Life Insurance Co. No. 68262 is determined to be $17,229.18.

Exhibit A, Attached to Petition.

	Returned	Determined
Marital Deduction	$132,092.32	$72,109.82

The deduction claimed in the return, Form 706, as bequests to the surviving spouse in the amount of $217,426.29 is disallowed, it having been determined that the bequest does not qualify for deduction under Section 812(e) of the Internal Revenue Code.

COMPUTATION OF TAX

	Determined	
Net estate for basic tax	$110,837.29	
Net estate for additional tax	$150,837.29	
Gross basic tax	$ 1,825.12	
Credit for State inheritance taxes	1,460.10	
Gross basic tax less credit		$ 365.02
Total gross taxes (basic and additional)	$ 35,951.19	
Less gross basic tax	1,825.12	
Gross additional tax		34,126.07
Net tax payable		$34,491.09
Estate Tax Assessed:		
Orig. Nov. 1949 Reg. List, Page 02, Line 0		12,629.11
Deficiency		$21,861.98

[R. 14-15]

Answer.

THE TAX COURT OF THE UNITED STATES

Estate of Edward F. Pipe, Deceased, Nettie M. Pipe, Executrix, Petitioner, v. Commissioner of Internal Revenue, Respondent.	Docket No. 39831.

Comes now the Commissioner of Internal Revenue, through his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition, except it is alleged that the date of filing the Federal estate tax return is November 14, 1949.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition. Alleges that the deficiency asserted is $21,861.98.

4 (a), (b) and (c). Denies that the Commissioner erred as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

5 (a) and (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

(c). Admits only that petitioner elected to have the gross estate of the decedent valued as of a date subsequent

to decedent's death, as authorized by Section 811(j) of the Internal Revenue Code. Denies the remaining allegations set forth in subparagraph (c) of paragraph 5 of the petition.

(d). Denies the allegations contained in subparagraph (d) of paragraph 5 of the petition on the ground that the said instrument itself is the best evidence of its contents.

(e). Denies the allegations contained in subparagraph (e) of paragraph 5 of the petition.

(f). Denies the allegations contained in subparagraph (f) of paragraph 5 of the petition.

(g). Denies the allegations contained in subparagraph (g) of paragraph 5 of the petition.

(h). Denies the allegations contained in subparagraph (h) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Sgd.) CHARLES W. DAVIS, HDT
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

HAROLD D. THOMAS,
Acting District Counsel,

RIGMOR O. CARLSEN,
Special Attorney,
Bureau of Internal Revenue.

ROC-cmp 5/21/52

[R. 18]

Minutes of Proceedings.

THE TAX COURT OF THE UNITED STATES.

Date March 30, 1953. Place New York, N. Y. Docket No. 39831.

Proceeding Estate of Edward F. Pipe, Deceased, Nettie M. Pipe, Executrix.

Assigned to Judge Clarence V. Opper. Division No. 14.

Counsel

For Petitioner, E. W. PAVENSTEDT, Esq., 14 Wall Street, New York 5, N. Y.

For Respondent, RIGMOR O. CARLSEN, Esq.

Stenographic Reporter, H. B. Smith.

Hearing 11:45-12:15 { Transcript Ordered Yes

ORDERED

Filed at hearing
Stipulation of facts with attached exhibits 1-A and 2-B.

Petitioner's brief	May 14, 1953	May 29, 1953
Respondent's brief	May 14, 1953	May 29, 1953

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STAT
JUDGE Judge Opper

(Signed) ROBERT I. BOWLES,
Deputy Clerk.

[R. 19-23]

Stipulation of Facts.

THE TAX COURT OF THE UNITED STATES.

ESTATE OF EDWARD F. PIPE, Deceased, NETTIE M. PIPE, Executrix, Petitioner, *against* COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 39831.

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through their respective attorneys, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with or contradictory to the facts herein stipulated:

1. The Petitioner is the duly appointed, qualified and acting Executrix of the Estate of Edward F. Pipe, deceased (hereinafter sometimes referred to as the "decedent"), a resident of White Plains, New York, who died on September 20, 1948. The Petitioner was appointed Executrix by the Surrogate's Court of Westchester County, State of New York, on November 10, 1948. The Petitioner's address is 18 Midland Avenue, White Plains, New York.

2. The Last Will and Testament of the decedent was admitted to probate by the Surrogate's Court of Westchester County, State of New York, on November 10, 1948.

3. In the Federal Estate tax return of the decedent, the Petitioner elected to have the gross estate of the decedent valued in accordance with values as of a date or dates

subsequent to the decedent's death, as authorized by Section 811(j) of the Internal Revenue Code (hereinafter sometimes referred to as the "optional valuation date").

4. On November 14, 1949, Petitioner, as Executrix, filed a Federal estate tax return for the Estate of Edward F. Pipe, deceased, and paid to the Collector of Internal Revenue, Fourteenth District of New York $12,629.11, the amount of tax shown thereon. On February 15, 1950, Petitioner signed a waiver, United States Treasury Department Form 890, agreeing to the assessment of a deficiency in estate tax in the sum of $2,551.69, together with interest thereon as provided by law. This deficiency resulted from determinations by the examining revenue agent increasing the value of certain securities by $3.55 and the value of certain survivorship annuities by $18,758.93. On February 17, 1950, Petitioner paid $2,551.69 to said Collector. On March 7, 1950, Petitioner paid to said Collector $24.56, representing interest on said $2,551.69 from December 20, 1949 to February 17, 1950. On January 30, 1952, the Office of the Internal Revenue Agent in Charge, 341 Ninth Avenue, New York City, New York, sent a ninety-day letter (copy of which is attached to the petition herein, marked Exhibit A) to Petitioner determining a deficiency in estate tax of $21,861.98. The statement attached to the ninety-day letter shows that said deficiency was based upon the above described additions to value of estate in the respective amounts of $3.55 and $18,758.93, and upon a further addition to value resulting from the disallowance of the marital deduction to the extent of $59,982.50. When computing this deficiency, no allowance was made for the above described payment of $2,551.69. On April 7, 1952 Petitioner filed a petition with the Tax Court of the United States for redetermination of said deficiency. Thereafter, in order to stop the running of interest, Petitioner on April 9, 1952 paid to said Collector the amount of the balance of the

alleged deficiency of $19,310.29, and interest thereon amounting to $2,642.29, or a total of $21,952.58.

5. In the statement attached to the ninety-day letter referred to in paragraph 4, the marital deduction allowable under Section 812(e) of the Internal Revenue Code was reduced for the following reason:

> "The deduction claimed in the return, Form 706, as bequests to the surviving spouse in the amount of $217,462.29 is disallowed, it having been determined that the bequest does not qualify for deduction under Section 812(e) of the Internal Revenue Code."

6. Decedent in Article Third of his last Will and Testament provided as follows:

> "THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my 'residuary estate', I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.
>
> "I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary

estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property."

7. The value at the optional valuation date of the property passing under Article THIRD of the decedent's Will was $217,429.84.

8. The entire value of the property, valued as of the optional valuation date, passing under Article THIRD of decedent's Will, was included in the decedent's gross estate in the Federal estate tax return filed by Petitioner and in the statement attached to the ninety-day letter dated January 30, 1952, referred to in paragraph 4 hereof.

9. The estate of the decedent has necessarily incurred, and will necessarily incur, additional attorneys' fees and administrative expenses, including the expense of the controversy involved herein, the amount of which has not presently been determined.

.....

Attorney for Petitioner.

.....

Attorney for Respondent.

Dated: October , 1952.

Exhibit 1-A, Attached to Stipulation of Facts.

I, EDWARD F. PIPE, a resident of the State of New York, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking any and all other wills and codicils by me at any time heretofore made.

FIRST: I direct my Executrix to pay all my just debts, funeral expenses and all expenses of my last illness as soon after my death as is practicable.

SECOND: I give, devise and bequeath to my wife, NETTIE M. PIPE, absolutely and forever, all real property, together with improvements thereon, which I may own or to which I may be entitled at the time of my death, and all my personal effects, clothing, books, pictures, furniture, furnishings, household equipment and automobiles.

THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my "residuary estate", I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.

I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any

Exhibit 1-A, Attached to Stipulation of Facts.

2. To sell, lease, mortgage and exchange all or any part of my estate, both real and personal, at such times and at public or private sale, and upon such terms and conditions as my Executrix or Executor may deem best.

3. In her or its sole discretion, to cause the securities which may from time to time comprise the funds in her or its hands to be registered in her or its name as Executrix or Executor or in the name of a nominee or nominees.

4. In dividing my estate or any portion thereof into parts or shares or in making distribution thereof, in her or its discretion, to make such division, delivery or distribution in kind, or partly in kind and partly in money, and to allot to any share or shares, in equal or unequal proportions, specific securities or property or any undivided interest therein.

5. To vote in person or by proxy upon all stocks or other securities held by her or it.

6. To settle, adjust, compound or dispose of on any terms and with or without allowing or obtaining any time or giving any security, claims and demands belonging to or made against me or my estate.

SEVENTH: I direct that all estate, succession, transfer, legacy and inheritance taxes and all interest and penalties thereon assessed by the United States or the State of New York against or with respect to any property required to be included as an asset of my gross estate for the purpose of determining said taxes shall be paid out of my residuary estate as an expense of administration and as a general charge thereon, and that no person receiving any part of my estate under this Will shall be required to reimburse my estate for any part of such taxes, and no apportionment of such taxes shall be made on any accounting or distribution of my estate, any law to the contrary notwithstanding.

IN WITNESS WHEREOF, I have hereunto set my hand and seal and declare this instrument to be my Last Will and Testament this 18th day of March, One thousand nine hundred and forty-six.

/s/ EDWARD F. PIPE (L. S.)

The foregoing instrument was, on the day of the date thereof, signed, sealed, published and declared by EDWARD F. PIPE, the Testator therein named, as and for his Last Will and Testament in the presence of us, the undersigned, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

HENRY D. STRACK
Residing at 159 Ralph Ave., White Plains, N. Y.

ERNEST A. FINTEL
Residing at 327 Hollywood Ave., Douglaston, L. I., N. Y.

KENNETH C. JOHNSON
Residing at 60 Sargent Road, Scarsdale, N. Y.

Opinion.

23 T. C. No. 14

THE TAX COURT OF THE UNITED STATES

ESTATE OF EDWARD F. PIPE, DECEASED, NETTIE M. PIPE, EXECUTRIX, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 39831. Filed October 22, 1954.

Spouse's bequest of legal life estate coupled with unlimited lifetime power of invasion but with remainders over, *held* not to qualify for the marital deduction from

gross estate permitted by section 812 (e), Internal Revenue Code of 1939.

EDMUND W. PAVENSTEDT, Esq., for the petitioner.

RIGMOR O. CARLSEN, Esq., for the respondent.

OPPER, Judge: A deficiency of $21,861.98 in estate tax is here being contested, of which $19,310.29 is in controversy. The sole issue is whether decedent's disposition of certain property qualifies for the marital deduction provided by section 812 (e), Internal Revenue Code of 1939.

All of the facts have been stipulated. They are found accordingly. The estate tax return was filed with the collector for the fourteenth district of New York. Decedent, who died a resident of White Plains, New York, on September 20, 1948, was survived by his widow who became executrix of his estate.

The will which was admitted to probate November 10, 1948, after devising to his wife all real property absolutely and forever, together with certain personal effects, provides in part:

> THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my "residuary estate", I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.

> I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property.
>
> FOURTH: On the death of my said wife * * * I give and bequeath all * * * of the property which can be identified at my wife's death as a part of my residuary estate * * * absolutely, to [certain named legatees].

The value at the optional valuation date of the property passing under article THIRD of the will was $217,429.84, all of which was included in the gross estate.

The question presented involves the construction of section 812 (e) of the estate tax law as enacted[1] in 1948: Does property bequeathed to a surviving wife for life, with unlimited powers of invasion or disposition during her lifetime, but with remainders over as to any residue left at her death, qualify for the marital deduction or does the wife acquire merely a "terminable interest" included in the

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[1] Internal Revenue Code of 1939.

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * * * *

exception provided in subsection (e) (1) (B) of the same section.[2]

(e) *Bequests, Etc., to Surviving Spouse.*—

(1) Allowance of Marital Deduction.—

(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

* * * * * * *

(F) Trust with Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent in trust, if under the terms of the trust the surviving spouse is entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse—

(i) the interest so passing shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for the purposes of subparagraph (B) (i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall be applicable only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

[2] (B) Life Estate or Other Terminable Interest.—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other

Petitioner's contention that what the wife took is the equivalent of a fee and consequently cannot be "terminable" does not seem to be advanced with any great conviction. It is in fact inconsistent with petitioner's own alternative argument and with an analysis of the New York law.

Section 149, New York Real Property Law, applicable as well to personalty, modifies the Rule in Shelley's Case by providing:

> Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life * * * such estate is changed into a fee absolute *in respect to the rights of creditors, purchasers and incumbrancers, but subject to any future estate limited thereon, in case the power of absolute disposition is not executed* * * * [Emphasis added.][3]

The intention of the testator is, as always, paramount.

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than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii))—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

[3] In this respect the present case is stronger for respondent than was the second issue in *Estate of Frank E. Tingley*, 22 T. C. ..... (May 26, 1954).

Thus, in *In re Mead's Will*, 115 Misc. Rep. 481, 190 N. Y. S. 123, the Surrogate was of the opinion that remainders over were not established with sufficient assurance to restrict the application of section 153, New York Real Property Law,[4] so that the power of disposition by the life tenants was "absolute";[5] while in *Terry* v. *Wiggins*, 47 N. Y. 512, a provision similar to that now before us was said to "clearly indicate an intention" to limit the wife's power of disposition to her life so that "By the will, the wife took an estate for life, * * * with remainder over at her death to the religious society, with power in the wife during the continuance of the life estate to defeat the remainder * * *," a description sufficiently apt to be applicable to the present situation. And see *Estate of Michael Melamid*, 22 T. C. ..... (July 23, 1954); *In Re Brower's Estate*, 278 App. Div. 851, 104 N. Y. S. 2d 658, affd. 304 N. Y. 661, 107 N. E. 2d 589.

Inconsistently, as it seems to us, petitioner insists as an alternative that what was accomplished was the creation of a trust, of which the wife was trustee and life beneficiary, with remainders over, but with an unqualified lifetime power over the corpus not only of disposition but of enjoyment and consumption. This is said to bring the situation within section 812 (e) (1) (F).[6]

That the life tenant in possession is often loosely referred to by the term "trustee" in the New York cases

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[4] SEC. 153. When power of disposition absolute.

Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute.

[5] But see *In Re Davies' Estate*, 242 N. Y. 196, 151 N. E. 205, 206, where the language of the will was similar to that now in controversy. "* * * as legatee he [the husband] received a life interest therein, with power 'to expend the principal as he may see fit,' and even though the power to expend was untrammeled by any conditions, it did not include the right to transfer it to himself so that he might hold it in fee absolute."

[6] See footnote 1, *supra*.

cannot be denied.[7] The references fall generally into two groups. In some, such as *Smith et al.* v. *Van Ostrand*, 64 N. Y. 278, for example, a restriction is placed by the will on the invasion of corpus. In that case only so much as was necessary "to her support" could be taken from principal. In *Leggett* v. *Stevens*, 185 N. Y. 70, 77 N. E. 874, the use was permitted by the surviving wife "for her own comfort and support."[8] In other instances the bequest has been construed as forbidding any invasion even with language like "use and enjoy" the property, as in *In re McDougall*, 141 N. Y. 21, 35 N. E. 961, 963:

> * * * On the contrary, we think the testator meant to give the widow nothing but an estate for her life or widowhood, terminable at the happening of either event, and that the remaindermen were entitled to receive at such time the *whole* corpus of the estate. [Emphasis added.]

See also *In re Ungrich*, 48 App. Div. 594, 62 N. Y. S. 975, aff'd. per curiam 166 N. Y. 618, 59 N. E. 1131; *In re Hamlin*,

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[7] This is not always so. In *Rose* v. *Hatch*, 125 N. Y. 427, 26 N. E. 467, for example, an express trust in favor of the husband, with a power of disposition limited to his personal needs was held to establish not a trust, but a legal life estate, preventing the merger with the fee, even as to creditors, because of the limitation. Holding that in such a situation a trust could not exist, the Court of Appeals said: "By the second clause of the will there was an attempt to make Asa L. Hatch [the husband] trustee for his own benefit during his life. Such a trust cannot be created. * * * Asa L. Hatch was, however, entitled to the possession of the land, and also to the rents and profits thereof, * * * it is clear that he took a legal estate in the land for life."

[8] In *Peck* v. *Smith*, 227 N. Y. 228, 125 N. E. 91, 92, the trial court "* * * found that * * * his widow had an absolute power of disposition, irrespective of her needs, and could make a valid gift * * * *" of the properties. "These findings were reversed by the Appellate Division * * * it found that the transfer was not made for the use, comfort, and benefit of Mrs. Peck * * *." The Court of Appeals in turn reversed, but on the ground that the plaintiffs had no capacity to sue.

141 App. Div. 318, 126 N. Y. S. 396. The employment of the trust concept in such situations is even less significant on the present point.

Where the power of disposition and invasion, though restricted to the period of the life tenancy, is unlimited, the "trust" if any is said to attach not to the property received by the life tenant, but at most to that which remains on his death.[9] That is apparently the outer limit of the present situation.

The rule is enunciated in *Seaward* v. *Davis*, 198 N. Y. 415, 91 N. E. 1107. " * * * It is doubtless true that *ordinarily* a life tenant in possession of personal property is a trustee *to preserve the principal* for the remaindermen to whom it may pass on his death. In this case, however, *the widow had the right to dispose of the property in her lifetime, and as to such property as she did dispose of* neither she nor her executor was bound to account to the remaindermen because they had no interest in it. * * *." [Emphasis added.] As petitioner expresses it, the question in that case "was the quantum of the trust with respect to which her executor must acount: Was it the full amount she received from her husband's estate *or merely the amount which remained undisposed of at her death?*" [Emphasis added.]

We think it follows that even if there was an implied trust here, and even if, contrary to respondent's contention, such a "trust" is covered by section 812 (e) (1) (F), and even if, in spite of the apparent language of the New York statute,[10] the wife could then use for herself the corpus of

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[9] "This disposition * * * would entitle the plaintiffs to so much of the fund as on her death remained unexpended. * * * *and this portion of the fund* she held in trust for them." *Smith et al.* v. *Van Ostrand, supra.* [Emphasis added.]

[10] " * * * A power vested in a person in his capacity as trustee of an express trust, to distribute principal to himself cannot be exercised by him * * * ; if there is no trustee qualified to execute the power, its execution devolves on the supreme court." Sec. 141, N. Y. Real Property Law. [Emphasis added.] And see *Rose* v. *Hatch, supra,* footnote 7.

the trust, as obviously the testator intended, and even if that question is to be governed by the local law of each of the 48 states, but cf. *Lyeth* v. *Hoey*, 305 U. S. 188, still the corpus constituting this trust would not only be less than the total share left to the wife, see *Estate of Louis B. Hoffenberg*, 22 T. C. ..... (September 17, 1954), but it would be so indefinite as to render impossible of identification at decedent's death what property is subject to the trust and therefore intended to be covered by section 812 (e) (1) (F). This seems to us an adequate reason for presuming that it was not the congressional intent to include this type of "trust" in the marital deduction provisions of that subsection.

Generally speaking, the "terminable interest" concept was devised for the purpose of assuring that if the property bequeathed to the spouse was to be excluded from gross estate with respect to the decedent, it would be adequately integrated in the spouse's estate so that on her death it would not escape the death tax a second time. As petitioner expresses it "The basic principle * * * is that the spouse first to die shall be permitted to pass on to the surviving spouse free of estate tax up to one-half of his or her estate, provided only that the terms of the transfer are such that this property will be taxable in the estate of the surviving spouse."

In the premises, the existence and scope of any "trust" established for the wife by decedent is so doubtful that it would scarcely seem logical to include the property in the wife's estate, if, when she dies, the corpus has neither been consumed nor donated. In that event, her failure to exercise the power of invasion will make it more reasonable to think of the remaindermen as succeeding to property left them by decedent.[11] We think the basic purpose of section

[11] In *Helvering* v. *Safe Deposit Co.* (Reynolds Est.), 316 U. S. 56, the Supreme Court had before it the question of including in gross estate as an "interest" under section 302 (a), Revenue Act of 1926, the predecessor of section 811 (a), property as to which dece-

812 (e) will hence be more adequately accomplished by considering the wife's interests here as "terminable," and by inclusion of the property in decedent's estate. See *Estate of Louis B. Hoffenberg; Estate of Michael Melamid,* both *supra.*

For the purpose of correcting an adjustment now conceded by respondent, and of taking into consideration estate expenses subsequently incurred,

Reviewed by the Court.

Decision will be entered under Rule 50.

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dent had a qualified beneficial life estate and a testamentary power of appointment which was unexercised at his death. The question was answered in the negative by a unanimous court. Four of the justices dissenting on another point, used this language: "It is conceded that no part of either estate passed by virtue of the execution by the decedent of the powers of appointment with which he was clothed. The property passed under the deed and wills of his parents, and that passage was the taxable event."

While under section 811 (f) property covered by certain unexercised powers of appointment is now taxable, it is evident from the restrictive language of section 812 (e) that Congress did not have this simple situation in mind in granting the marital deduction. We do not understand petitioner to contend otherwise.

[R. 241]

Decision.

THE TAX COURT OF THE UNITED STATES.

Estate of Edward F. Pipe, Deceased, Nettie M. Pipe, Executrix, Petitioner, v. Commissioner of Internal Revenue, Respondent.	Docket No. 39831.

Respondent having on March 18, 1955, filed a recomputation of tax for entry of decision as in accordance with Opinion of the Court, filed October 22, 1954, and petitioner having concurred therein, now, therefore, it is

Ordered and Decided: That there is an overpayment of estate tax in the amount of $114.76 which was paid after the mailing of the notice of deficiency and within the time provided by Section 912, Internal Revenue Code of 1939.

(Signed) Clarence V. Opper,
Judge.

Entered Mar. 21, 1955.

[R. 242-247]

Petition to Reverse Decision.

THE TAX COURT OF THE UNITED STATES.

ESTATE OF EDWARD F. PIPE, Deceased, NETTIE M. PIPE, Executrix, Petitioner, Petitioner on Review, v. COMMISSIONER OF INTERNAL REVENUE, Respondent, Respondent on Review.	Docket No. 39831.

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Now comes petitioner, petitioner on review, by its attorney, Edmund W. Pavenstedt, and respectfully shows:

I

Petitioner is Nettie M. Pipe, Executrix under the last Will and Testament of Edward F. Pipe, deceased. Petitioner resides at 18 Midland Avenue, White Plains, New York. The decedent died testate on September 20, 1948, a resident of the State of New York and petitioner duly qualified as Executrix under decedent's last Will and Testament pursuant to letters testamentary issued by the Surrogate's Court of Westchester County, State of New York, under date of November 10, 1948. The petitioner filed a Federal Estate Tax Return with the Collector of Internal Revenue for the Fourteenth District of New York, whose office is

located in the judicial circuit of the United States Court of Appeals for the Second Circuit. Respondent on review (hereinafter referred to as "Commissioner") is the duly authorized and acting Commissioner of Internal Revenue holding his office by virtue of the laws of the United States.

II

The Commissioner determined a deficiency in estate tax against petitioner in the amount of $21,861.98 and sent petitioner notice thereof by registered mail under date of January 30, 1952, in accordance with the provisions of Section 871(a) of the Internal Revenue Code of 1939, as amended. This deficieny did not allow credit for a voluntary payment of additional estate tax amounting to $2,551.69 which the petitioner had made to the Collector of Internal Revenue for the Fourteenth District of New York on February 17, 1950. Thereafter, on April 7, 1952, petitioner duly filed an appeal from said deficiency with the Tax Court of the United States. Thereafter the petitioner paid to said Collector $19,310.29, which is the difference between the deficiency of $21,861.98 and the prior payment of $2,551.69. The hearing on said appeal before the Tax Court of the United States was held in New York on March 30, 1953 before the Honorable Clarence V. Opper, Judge. The Tax Court filed its findings of fact and opinion on said appeal on October 22, 1954. Application for rehearing was denied by the Tax Court on November 23, 1954. Pursuant to an agreed computation made under The Tax Court's opinion, it entered its decision on March 21, 1955, adjudging that there was an overpayment of estate tax in the amount of $114.76 which was paid after the mailing of the notice of deficiency and within the time provided by Section 912, Internal Revenue Code of 1939.

III

The issue is whether the Commissioner erred in determining that bequests to the surviving spouse of decedent in the amount of $217,429.84 did not qualify for the Federal estate tax marital deduction under Section 812(e) of the Internal Revenue Code of 1939, and consequently erred in failing to allow as a deduction from the gross estate of the decedent under Section 812(e) of the Internal Revenue Code of 1939 the amount of $141,473.55, representing the marital deduction for bequests to the surviving spouse of the decedent.

IV

The facts, as stipulated and as found by The Tax Court are:

Edward F. Pipe died testate, on September 20, 1948, a resident of White Plains, New York. His widow, Nettie M. Pipe, the petitioner herein, was appointed executrix by the Surrogate's Court of Westchester County, State of New York, on November 10, 1948. The petitioner's address is 18 Midland Avenue, White Plains, New York.

The Federal estate tax return for the estate of Edward F. Pipe was filed with the Collector of Internal Revenue for the Fourteenth District of New York.

In said Federal estate tax return, the petitioner elected to have the gross estate of the decedent valued in accordance with values as of a date or dates subsequent to the decedent's death, as authorized by Section 811(j) of the Internal Revenue Code of 1939 (hereinafter sometimes referred to as the "optional valuation date"). The Commissioner, in determining a deficiency, added to the value of the net estate $59,982.50 described as "Marital Deduction." He explained

"The deduction claimed in the return, Form 706, as bequests to the surviving spouse in the amount of $217,426.29 is disallowed, it having been determined that the bequest does not qualify for deduction under Section 812(e) of the Internal Revenue Code."

Decedent in his last Will and Testament provided as follows:

"THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my 'residuary estate', I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.

"I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property.

"FOURTH: On the death of my said wife * * * I give and bequeath all the rest of the property which can be identified on my wife's death as a part of my residuary estate * * * absolutely, to [certain named legatees]."

The value at the option valuation date of the property passing under Article THIRD of the decedent's will was $217,429.84.

The entire value of the property, valued as of the optional valuation date, passing under Article THIRD of decedent's will, was included in the decedent's gross estate in the Federal estate tax return filed by petitioner and in the statement attached to the notice of deficiency dated January 30, 1952 referred to in paragraph II hereof.

V

The assignments of error are:

The Tax Court erred

(1) in concluding that the bequest under Article THIRD of the decedent's will does not qualify for the marital deduction under Section 812(e) of the Internal Revenue Code of 1939.

(2) In failing to conclude that the bequest under Article THIRD of the decedent's will qualifies for the marital deduction under Section 812(e) of the Internal Revenue Code of 1939.

WHEREFORE, petitioner prays that the decision of The Tax Court of the United States be reversed by the United States Court of Appeals for the Second Circuit and that a transcript of the record be prepared in accordance with the law and the rules of said Court and transmitted to the Clerk of such Court, and that appropriate action be taken

to the end that the errors complained of may be reviewed and corrected by said Court and that this judgment and order by The Tax Court of the United States be reversed.

Dated: June 14, 1955.

Respectfully submitted,

EDMUND W. PAVENSTEDT,
Attorney for Petitioner,
Petitioner on Review,
14 Wall Street,
New York 5, N. Y.

WHITE & CASE, Esqs.,
14 Wall Street,
New York 5, N. Y.
Of Counsel.

[R. 248]

Notice of Filing Petition for Review.

IN THE UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

ESTATE OF EDWARD F. PIPE, Deceased, NETTIE M. PIPE, Executrix, Petitioner on Review, *vs.* COMMISSIONER OF INTERNAL REVENUE, Respondent on Review.	Docket No. 39831.

To:

JOHN POTTS BARNES,
Chief Counsel,
Internal Revenue Service.

You are hereby notified that the above-named petitioner did, on the 15th day of June, 1955, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Second Circuit, of the decision of this Court heretofore rendered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 15th day of June, 1955.

/s/ VICTOR S. MERSCH
VICTOR S. MERSCH,
Clerk,
The Tax Court of the United States.

Service of copy of Petition for Review acknowledged this 15th day of June, 1955.

JOHN POTTS BARNES, R.
Chief Counsel
Internal Revenue Service
Attorney for Respondent.

[R. 249]

Certificate.

THE TAX COURT OF THE UNITED STATES

WASHINGTON, D. C.

ESTATE OF EDWARD F. PIPE, Deceased, NETTIE M. PIPE, Executrix, Petitioner, *vs.* COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 39831.

I, VICTOR S. MERSCH, Clerk of the Tax Court of the United States, do hereby certify that the foregoing pages 1 to 248, inclusive, constitute and are all of the original papers and proceedings, including exhibits 1-A and 2-B attached to the Stipulation of Facts, on file in my office as the original and complete record in the proceeding before The Tax Court of the United States entitled: "Estate of Edward F. Pipe, Deceased, Nettie M. Pipe, Executrix, Petitioner *v.* Commissioner of Internal Revenue, Respondent, Docket No. 39831" and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 18th day of July, 1955.

/s/ VICTOR S. MERSCH,
Clerk,
The Tax Court of the United States.

(SEAL)

Last day to file record:
July 25, 1955.

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SUPREME COURT, U.S.

FILED
MAY 27 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. ~~1031~~ 148

Estate of EDWARD F. PIPE, Deceased,
NETTIE M. PIPE, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RUSSELL D. MORRILL,
Counsel for Petitioner,
14 Wall Street,
New York 5, New York.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No.

ESTATE OF EDWARD F. PIPE, Deceased,
NETTIE M. PIPE, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered on February 7, 1957.

Opinions Below.

The opinion of the Tax Court of the United States is reported at 23 T. C. 99.[1] The opinions of the Court of Appeals are reported at 241 F. 2d 210 and are printed in Appendix A, *infra*, p. 12.

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[1] See, record as printed for the use of the court below, pp. 31-40.

Jurisdiction.

The Judgment of the Court of Appeals was entered on February 7, 1957. (R. 62). Petitioner's timely Petition for Rehearing was denied on March 4, 1957. (R. 69). The jurisdiction of this Court is based on 28 U. S. C. §1254(1).

Question Presented.

Does decedent's bequest of his residuary estate to his widow for life with full power to use, enjoy, sell or dispose of the income and principal thereof during her life in her uncontrolled discretion meet the conditions of Section 812(e) of the Internal Revenue Code of 1939 so as to qualify for the marital deduction for Federal estate tax purposes?

Statute Involved.

Section 812(e) of the Internal Revenue Code of 1939, Act of February 2, 1939, c. 2, §812, 53 Stat. 123, as added by Section 361(a) of the Act of April 2, 1948, c. 168, 62 Stat. 117, 121, 26 U. S. C., 1952 ed., §812.

The relevant subsections are printed in Appendix B, *infra*, p. 23.

Statement.

Petitioner filed a petition with The Tax Court of the United States for a redetermination of a deficiency in Federal estate tax set forth in a notice of deficiency issued by the respondent. The jurisdiction of that Court was based on 26 U. S. C. §1101. The following facts were before the Tax Court:

Edward F. Pipe, who died a resident of White Plains, New York on September 20, 1948, was survived by his widow who became Executrix of his estate. The estate tax return was filed with the Collector of Internal Revenue for the Fourteenth District of New York.

The will which was admitted to probate November 10, 1948, after devising to his wife all real property absolutely and forever, together with certain personal effects, provides in part:

> THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my "residuary estate", I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.
>
> I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property.

> FOURTH: On the death of my said wife * * * I give and bequeath all * * * of the property which can be identified at my wife's death as a part of my residuary estate * * * absolutely, to [certain named legatees].

The value at the optional valuation date of the property passing under Article THIRD of the will was $217,429.84, all of which was included in the gross estate by the respondent in his notice of deficiency.

The Tax Court held that the decedent's bequest of his residuary estate to his widow did not meet the conditions of Section 812(e) of the Internal Revenue Code of 1939 so as to qualify for the marital deduction. The Court of Appeals affirmed, Circuit Judge Swan dissenting with opinion.

REASONS FOR GRANTING THE WRIT.

1.

The court below has erroneously decided an important question of federal estate tax law which has not been, but should be, settled by this Court.

a. The Decision of the Court Below Conflicts with the Object and Policy of Congress in Enacting the Marital Deduction Provision.

The object and policy of the marital deduction provisions was to equalize the federal estate tax between married couples residing in common law states and those residing in community property states.[2] The intent was to extend

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[2] Sen. Rep. No. 1013, 80th Cong., 2d Sess., pp. 26-28 (1948), 1948-1 Cum. Bull. 285, 303-305; *Awtry's Estate* v. *Com'r.*, 221 F. 2d 749, 760 (8th Cir. 1955); *Weyenberg* v. *United States*, 135 F. Supp. 299, 301 (E. D. Wis. 1955); *Hamrick* v. *Pitts*, 135 F. Supp. 835, 837 (W. D. S. C. 1955), aff'd 228 F. 2d 486, 490 (4th Cir. 1955). See, also Judge Swan's dissenting opinion in the instant case, 241 F. 2d 210, 214 (Appendix A, *infra*, p. 19).

community property treatment to all cases where the one-half of the property which passed to the surviving spouse free of estate tax in the estate of the spouse first to die would (if not consumed or disposed of) be subject to estate tax in the estate of the spouse last to die. For this purpose the Congress in §812(e)(1)(F) of the 1939 Code[3] devised a special type of marital deduction trust under which taxation in the estate of the spouse last to die was insured by the requirement that such spouse must have a power to appoint the corpus either to herself or to her estate.[4] Under §811(f) possession of such a power, whether exercised or not, renders the property subject thereto includible in the taxable estate of the holder of the power.

In discussing this marital deduction trust provision, the Senate Finance Committee Report stated:[5]

> "These provisions have the effect of allowing a marital deduction with respect to the value of property transferred in trust by or at the direction of the decedent, *where the surviving spouse, by reason of her right to the income and a power of appointment is the virtual owner of the property.* This provision is designed to allow the marital deduction for such cases *where the value of the property over which the surviving spouse has a power of appointment will (if not consumed) be subject to either the estate tax or the gift tax in the case of such surviving spouse.*" (Italics supplied.)

The Court below held that an unlimited power to invade or dispose of corpus held by a legal life tenant, even though the bequest to her created a trust under the appli-

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[3] Appendix B, *infra*, p. 24.

[4] Treasury regulations defined the term "power of appointment" to include a power in a beneficiary of a trust "to appropriate or consume the principal" thereof. Regs. 105, §81.24.

[5] Sen. Rep. No. 1013, 80th Cong., 2d Sess., Part 2, p. 16 (1948), 1948-1 Cum. Bull. 331, 342.

cable local law,[6] was not the equivalent of a similar power held by the income beneficiary of a trust under which a third party was appointed trustee. It reasoned that the property which the life tenant did not consume or dispose of would continue to be held in trust for the named remaindermen and that, therefore, the life tenant did not have power to appoint the entire corpus to herself free of the trust as required by the statute.[7]

The rights of a legal life tenant possessed of the unlimited *inter vivos* power which Mrs. Pipe had are, from a practical point of view, no different from those of a surviving spouse having a similar power under a marital deduction trust where a third party is the trustee. In the latter case the surviving spouse can terminate the trust, in part or in whole, at will and do what she likes with the property including bequeathing it by her will. Mrs. Pipe can give away all or any part of the property or transfer it to a trust reserving the income for life with remainder to anyone she pleases. If she creates a revocable trust she is exercising what, in effect, is the equivalent of a power to bequeath.

Under these circumstances we submit that such differences in the method of exercising the power are wholly unimportant and are clearly insufficient to call for the technical construction of the statute applied by the Court below which, on the basis of canons of statutory construction laid down by this Court, is properly rejected in the well reasoned dissenting opinion of Circuit Judge Swan.[8]

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[6] In this case, that of the State of New York. See, *Smith* v. *Van Ostrand*, 64 N. Y. 278 (1876); *Leggett* v. *Stevens*, 185 N. Y. 70 (1906); *Seaward* v. *Davis*, 198 N. Y. 415, 92 N. E. 91 (1910); *Peck* v. *Smith*, 227 N. Y. 228, 125 N. E. 91 (1919); *Keefe* v. *Keefe*, 257 N. Y. 604, 178 N. E. 814 (1931). In the first two of the cited cases the legal life tenant had a qualified power, in the last three an absolute power.

[7] Appendix A, *infra*, p. 18.

[8] *Id.*, p. 19.

b. The Decision of the Court Below Has Raised Grave Doubt in the Minds of Members of the Bar Charged with the Responsibility of Drafting Wills as to the Conditions Required to Be Met by a Trust in Order to Qualify for the Marital Deduction.

The Court below, in concluding that the bequest to Mrs. Pipe did not qualify for the marital deduction under Section 812(e)(1)(F) because her power to invade and consume was deficient, stated:[9]

> "*During her lifetime* no restraint whatsoever is imposed upon her power to consume or dispose of the principal of her life estate as she wishes. She has a power to *consume*, but she may not devise or bequeath any unconsumed corpus at her death to beneficiaries of her own choice." (Italics as in the opinion below.)

The Court below is here stating that a trust for the surviving spouse will only qualify for the marital deduction if she has both an *inter vivos* and a testamentary power of appointment. This is clearly contrary to the statute, §812(e)(1)(F), which provides that possession of *either* power is sufficient, namely, of a power exercisable in favor of herself or in favor of her estate.[10]

The Senate Finance Report specifically states:[11]

> "If one such power is her only power, the requirement is met."

The Treasury Regulations[12] which discuss the five statutory conditions which must be satisfied for a trust to

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[9] *Id.*, pp. 17-18.

[10] Appendix B, *infra*, p. 24.

[11] Note 5, *supra*, at p. 17, 1948-1 Cum. Bull. at p. 343.

[12] Regulations 105, §81.47a(e).

qualify under §812(e)(1)(F),[13] state that the surviving spouse must have the power to appoint free of the trust exercisable in favor of herself or of her estate, and that such power must be exercisable by her alone and in all events. In order to meet these two conditions, the Regulations continue, the power must fall within *one* of the following categories:

(1) A power to appoint fully exercisable in her own favor at any time following her husband's death; or

(2) A power to appoint exercisable in favor of her estate; or

(3) A combination of both.

As an example under (1) the Regulations give "an unlimited power to invade" which is precisely the power which Mrs. Pipe had.

It seems clear that the Court below fell into error when it stated that a power in the surviving spouse to appoint to herself must include a power to bequeath, i.e. a power to appoint to her estate. However, until this question is resolved by this Court, members of the bar charged with the responsibility of drawing wills can not know whether §812(e)(1)(F) is to be interpreted literally, namely, to the effect that a trust will qualify for the marital deduction if, among other things, the surviving spouse has power to appoint the corpus free of the trust *either* to herself *or* to her estate, or whether, as the Court below appears to believe, a power to appoint to herself must be complemented by a power to bequeath.

[13] Appendix B, *infra*, p. 24.

The decision of the Court of Appeals for the Second Circuit conflicts with the decision of the Tax Court of the United States in *Estate of Ellis*, 26 T.C. 694 (1956), now pending in the Court of Appeals for the Third Circuit on respondent's appeal.

Petitioner recognizes that a conflict of this type is not literally within the examples set forth in Rule 19. Nevertheless, petitioner believes that the consequences of a conflict between the Tax Court and a Court of Appeals on a novel Federal tax question of broad general interest are sufficiently important to warrant a resolution thereof by this Court. The importance of such a conflict is emphasized by the Tax Court's recently announced position that it will disregard reversals by Courts of Appeals, if not convinced by the reasoning thereof because

> "* * * a court of national jurisdiction to avoid confusion should follow its own honest beliefs until the Supreme Court decides the point."[14]

As the Court below expressly recognized[15] its decision is based on an interpretation of the term "an unlimited power to invade" which is inconsistent with that adopted by the Tax Court of the United States in *Estate of Harry A. Ellis*, 26 T. C. 694 (1956). In the *Ellis* case the surviving spouse, who was the income beneficiary of a trust created under her husband's will, had power to invade principal in such amounts as she might require, it being expressly provided that she alone should be the judge of

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[14] *Arthur L. Lawrence*, 27 T. C. No. 82 (January 25, 1957), at page 5 (not yet officially reported).

[15] Appendix A, *infra*, p. 18, footnote 4.

how much should be required. The majority of the Tax Court interpreted these provisions as giving the widow an unlimited power to invade the corpus and held that the bequest qualified for the marital deduction under Section 812(e)(1)(F) of the 1939 Code.[16] In the instant case the Court below held that Mrs. Pipe's unlimited power to invade corpus during her lifetime was not broad enough to meet the statutory test. The respondent has filed a petition for review of the Tax Court's decision in the *Ellis* case with the Court of Appeals for the Third Circuit.

Counsel for petitioner, although in the nature of things they are not in possession of complete facts, have been informed by attorneys for a number of other estates that the identical issue involved in the *Pipe* case is presented in their cases which are either pending in the courts or before the Treasury Department. The same issue will doubtless be presented in the cases of still other taxpayers.

But the issue is of broader importance than the relatively narrow question presented by cases involving a legal life tenant. Until this Court speaks the bar will be left without a guidepost as to the scope of the power to appoint required to qualify for the marital deduction a devise or bequest to a surviving spouse, whether she be the income beneficiary of a formal trust, as was Mrs. Ellis, or a legal life tenant who under local law takes as a trustee, as did Mrs. Pipe. This question casts grave doubt on the adequacy of many existing wills to entitle the estate to the marital deduction.

The conflict between the Tax Court and the Court below with respect to an issue of such general importance should be settled promptly. It can only be settled by this Court.

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[16] The dissenting Tax Court judges stated (26 T. C. 694, 701) that this holding was difficult to reconcile with the Tax Court's earlier decision in the *Pipe* case.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RUSSELL D. MORRILL,
Counsel for Petitioner.

EDMUND W. PAVENSTEDT,
Of Counsel.

Appendix A.

Opinions Below.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89—October Term, 1956.

(Argued December 11, 1956 Decided February 7, 1957.)

Docket No. 23748

ESTATE OF EDWARD F. PIPE, Deceased,
Nettie M. Pipe, Executrix,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Before:

SWAN, MEDINA and WATERMAN,
Circuit Judges.

Petition to review a decision of the Tax Court, 23 T. C. 99, which held that decedent's bequest of a residuary estate to his widow for her life with power to use income and principal during her life in her uncontrolled discretion did not meet the conditions of Section 812(e) of the Internal Revenue Code so as to qualify for the so-called marital deduction. Affirmed.

EDMUND W. PAVENSTEDT (Russell D. Morrill, White & Case, of counsel), New York City, *for Petitioner-Appellant.*

CHARLES K. RICE, Asst. Atty. Gen. (Lee A. Jackson, Hilbert P. Zarky, Marvin W. Weinstein, Attys., Dept. of Justice, Washington, D. C.), *for Respondent-Appellee.*

WATERMAN, *Circuit Judge:*

Edward E. Pipe deceased on September 20, 1948 domiciled in the State of New York. He was survived by his widow, Nettie M. Pipe, who became executrix of his estate. The executrix petitions us, pursuant to sections 7482 and 7483 of the 1954 Internal Revenue Code, to review a Tax Court decision reported in 23 T. C. 99 (1955). This decision holds that the decedent's estate tax was overpaid in the amount of $114.76, but since the Tax Court took into account a sum of $19,310.29 deposited by taxpayer solely to stop the running of interest, the determination actually was a finding of an estate tax deficiency in the amount of $19,195.53. This deficiency results from the denial by the Commissioner of a deduction of $141,473.55 claimed under section 812(e) of the Internal Revenue Code of 1939, as amended in 1948. The deduction was sought with respect to a bequest by decedent to his surviving spouse of a legal life estate in personalty that had been valued for federal estate tax purposes at $217,429.84, coupled with unlimited powers in the widow to invade during her lifetime, but with remainders over to named legatees as to any residue left at her death.

The pertinent provisions of the will are as follows:

> "THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my 'residuary estate,' I give, devise and bequeath to my wife, Nettie M. Pipe, to have and to hold the same for the term

of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof for such purposes or in such manner, as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.

"I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property.

"FOURTH: On the death of my said wife * * * I give and bequeath all * * * of the property which can be identified at my wife's death as a part of my residuary estate * * * absolutely, to [certain named legatees]."

I

The appellant's first principal contention is that this bequest qualifies for the so-called marital deduction under subsection 812(e)(1)(A) of the 1939 Code inasmuch as the life tenancy it creates is equivalent to absolute ownership of the principal of the bequest. Appellant relies on section 149 of the New York Real Property Law, which is

also applicable to personal property. *In re Dean's Estate*, 166 Misc. 499, 2 N. Y. S. 2d 757 (1938). Section 149 provides:

> "Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of *creditors*, purchasers and incumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts."

It is argued that under the law of New York this particular bequest created a fee absolute interest in the widow and that New York law determines the legal characterization of the bequest because the testator died domiciled in New York.

The appellant argues that the person who has a fee in respect to the rights of his creditors under section 149 has a fee for all practical purposes. This position is untenable, however, because one of the most significant elements of absolute ownership is the power of the owner to determine to whom the property shall pass upon his death. Section 149 specifically protects the interests of remaindermen limited after a life tenancy in the event the life tenant does not fully dispose of the property *during his lifetime*. Since Mrs. Pipe cannot make a testamentary disposition of any part of this estate, her interest is not converted into a fee simple absolute by section 149.[1] *Terry* v. *Wiggins*, 47 N. Y. 512 (1872); *In re Alimann's Will*, 128 N. Y. S. 2d 204 (1953).

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[1] Nor does §149 change the estate given to a grantee with a power of disposition during lifetime into a fee absolute for purposes of New York state taxes. *In re Sonnenburg's Estate*, 133 Misc. 42, 231 N. Y. S. 191 (1928).

II

The appellant's second main contention is that this bequest, if it does not convey a fee simple absolute, qualifies for the marital deduction under subsection 812(e)(1)(F), which provides:

> "*Trust with Power of Appointment in Surviving Spouse.*—In the case of an interest in property passing from the decedent in trust, if under the terms of the trust the surviving spouse is entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse—
>
> (i) the interest so passing shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and
>
> (ii) no part of the interest so passing shall, for the purposes of subparagraph (B)(i), be considered as passing to any person other than the surviving spouse.
>
> This paragraph shall be applicable only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

The appellant argues that this subsection was intended to embrace not only express trusts but also those bequests that are treated as trusts under the applicable state law, here the local law of New York. Reference is made to a

number of New York cases holding that a legal life tenant, even if vested with an unqualified power to invade and consume the corpus during his lifetime, holds the principal of his estate in trust as a "trustee" for the named remaindermen.[2] But since subsection 812(e)(1)(F) also requires that the trust be coupled with a power of appointment, appellant cannot rest on these cases alone. It is necessary, in addition, to equate Mrs. Pipe's power to invade and consume the principal with a general power of appointment, as that term is used in the 1939 Code. Apparent support for the proposition that the equivalent of such a power is present here can be found in U. S. Treasury Regulation 105, §81:24,[3] which defines a power of appointment in the following manner:

> "The term 'power of appointment' includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations. For example, if a transfer in trust provides that the beneficiary may appropriate or consume the principal of the trust, such power to consume or appropriate is a power of appointment."

But even assuming, *arguendo*, that the bequest at bar did create a "trust" under the law of New York that would comply with the minimal requirements of subsection 812 (e)(1)(F), we must hold that it does not qualify for the marital deduction under that section. We cannot do otherwise, for a reading of this statutory provision and its apposite Treasury Regulations in their entirety make it clear that Mrs. Pipe's power to invade and consume is not the type of "unlimited power to invade" referred to in the Regulations. See U. S. Treas. Reg. 105, §81.47a. *During her lifetime* no restraint whatsoever is imposed upon her

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[2] E.g., *Keefe* v. *Keefe*, 257 N. Y. 604, 178 N. E. 814 (1931); *Peck* v. *Smith*, 227 N. Y. 228, 125 N. E. 91 (1919); *Seaward* v. *Davis*, 198 N. Y. 415, 92 N. E. 1107 (1910).

[3] See also *Estate of Ellis*, 26 T. C. No. 85 (1956).

power to consume or dispose of the principal of her life estate as she wishes. She has a power to *consume*, but she may not devise or bequeath any unconsumed corpus at her death to beneficiaries of her own choice. Thus her power under the terms of Mr. Pipe's will is not the "unlimited power to invade" referred to in the Regulations, because to comply with that requirement, the "power in the surviving spouse must be a power to appoint the corpus to herself as unqualified owner or to appoint the corpus as a part of her estate, that is, in effect, to dispose of it to whomsoever she pleases." U. S. Treas. Reg. 105, §81.47a. Or, in the language of the statute itself, the surviving spouse must be able to appoint the entire corpus "free of the trust" to herself or her estate. This Mrs. Pipe cannot do, because as long as any of the corpus of her estate remains, it will be held "in trust" for the named remaindermen.[4]

III

Lastly, the appellant argues that the disallowance of a deduction for this bequest would frustrate the clear intent of Congress in enacting the marital deduction provisions in 1948. Citing extensive legislative history, *e.g.*, S. Rep. No. 1013, 80th Cong., 2d Sess. (1948), the appellant points out that Congress sought a general uniformity of tax treatment of decedents' estates in both community property and common law states.[5] The method adopted, in general, was to permit a deduction from the gross estate of the spouse who first deceased, for the value of property that would be included, if not consumed, in the gross estate of the sur-

[4] *Estate of Ellis*, 26 T. C. No. 85 (1956), where the decedent died domiciled in Pennsylvania, although distinguishable from the case at bar because it dealt with an express trust, asserts a position as to the meaning of "an unlimited power to invade" inconsistent with that here adopted. To the extent that the two decisions are irreconcilable, we approve the analysis set forth in the dissent in that case.

[5] See also *Hamrick* v. *Pitts*, 135 F. Supp. 835, 837 (W. D. S. C.), *aff'd*, 228 F. 2d 486 (4th Cir. 1955); *Weyenberg* v. *United States*, 135 F. Supp. 299, 301 (E. D. Wis. 1955).

viving spouse, thereby subjecting the value of that property so deducted to only one estate tax, which would be exacted at the survivor's death. Mrs. Pipe argues that the unconsumed principal of her life estate will be included in her gross estate for federal tax purposes because of her unqualified power to invade the corpus during her lifetime. It is not necessary for us, however, to determine the validity of this contention, because the possibility of double taxation is not a sufficient basis for allowing a marital deduction if the bequest does not comply with the specific statutory requirements of section 812(e). *Starrett* v. *Commissioner*, 223 F. 2d 163 (1st Cir. 1955). Cf. *Estate of Shedd* v. *Commissioner*, 237 F. 2d 345 (9th Cir. 1956); *Estate of Hoffenberg* v. *Commissioner*, 22 T. C. 1185 (1954), *aff'd per curiam*, 223 F. 2d 470 (2d Cir. 1955). Here the appellant has failed to prove that this bequest falls within any of the express provisions for marital deductions under the 1939 Code.

Affirmed.

SWAN, *Circuit Judge* (dissenting):

Nearly a century ago the Supreme Court speaking through Chief Justice Taney, declared in *United States* v. *Boisdore's Heirs*, 8 How. 113, 121: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." This was quoted with approval as recently as February 1956 in *Mastro Plastics Corp.* v. *Labor Board*, 350 U. S. 270, 285, which in turn was quoted on this point in *Labor Board* v. *Lion Oil Co.*, 352 U. S. 282, 288 (Jan. 22, 1957). The object and policy of the marital deduction provisions of section 812(e) are, as stated in *Estate of Ellis*, 26 T. C. 694, "to remove as far as possible the discrimination with respect to estate taxes between decedents of community property states and those of non-community property states." One of the provisions enacted to accomplish this object was section 812(e)(1)(F) quoted in the majority opinion. In discussing this

subparagraph, the Senate Finance Committee Report stated:

> "These provisions have the effect of allowing a marital deduction with respect to the value of property transferred in trust by or at the direction of the decedent, *where the surviving spouse, by reason of her right to the income and a power of appointment, is virtually the owner of the property.* This provision is designed to allow the marital deduction for such cases *where the value of the property over which the surviving spouse has a power of appointment will (if not consumed) be subject to either the estate tax or the gift tax in the case of such surviving spouse.*" [Italics added.][1]

Bearing in mind the canon of construction approved by the Supreme Court in the cases cited above, I think subparagraph (F) should not be interpreted so literally as to preclude the marital deduction, where, as in the present case, the widow has a life interest in the deceased husband's residuary estate, an unlimited power to appoint the principal to herself, and is by local New York law constituted a trustee for the remaindermen of unconsumed principal.[2]

In *Estate of Ellis, supra,* decided subsequently to the case at bar, the decedent's will left the residue of his estate in trust, all income payable to his widow for life. The widow also received the power to invade corpus if she should so require, she to be the sole judge as to how much she should require. At her death principal remaining was payable one-half to her estate and one-half to their chil-

---

[1] Sen. Rep. 1013, 80th Cong. 2d Sess., Part 2, p. 16 (1948); 1948-1 Cum. Bull. 285, 242.

[2] In *Weyenberg* v. *United States* (E. D. Wis.), 135 F. Supp. 299 at 301, the court said, after stating that the purpose of the marital deduction provisions was to equalize the federal estate tax between citizens of common law states and citizens of community property states, "The method of equalization was to some extent left up to the individual states."

dren. The Tax Court held that the bequest qualified for the marital deduction under section 812(e)(1)(F). In reaching this conclusion the court interpreted the will as giving the widow an unlimited power to consume the corpus. Mrs. Pipe as life tenant was given equal power. The court also accepted as correct the petitioner's contention that the value of any part of the trust corpus unconsumed at the widow's death would be includible as a part of her estate for purposes of the estate tax. In *Estate of Pipe* the petitioner makes the same contention. The court further held that Mrs. Ellis by reason of her unlimited power to invade and consume principal could exhaust the trust corpus "and thereby destroy the remainders." This is equally true of Mrs. Pipe.

The majority opinion in *Estate of Ellis* attempts to distinguish *Estate of Pipe* on two grounds neither of which do I find persuasive. It says, first, that in *Estate of Pipe* the devise was "*direct*, and not in trust," of a legal life estate to the surviving spouse, and "Section 812(e)(1)(F) is clearly limited to trusts." This seems a purely formal distinction and inconsistent with the purpose of the statute.[3] As already noted the two widows had precisely the same powers to invade the corpus, and by consuming the entire corpus to destroy the remainders. And any unconsumed corpus at the widow's death would be treated as part of her estate for estate tax purposes.

The second suggested distinction is that *Estate of Pipe* held, without actually passing on the petitioner's contention that a trust existed, "that even if there was such a

---

[3] It is expressly rejected in section 2056(b)(5) of the 1954 Code as to decedents dying after August 16, 1954. See also Senate Rep. No. 1622, 83rd Cong. 2d Sess., Part 2, 125 (1954):

> "A marital deduction is allowed in computing the taxable estate under present law for the value of property passing from one spouse to the other, if the surviving spouse has a right to the income from all of the property and has a general power of appointment over all of it. However, present law requires in such cases that the property be placed in 'trust' and *because of doubt under the law of the various States as to what constitutes a 'trust' it is not clear when a legal life estate will qualify as a trust.*" [Italics added.]

trust, it would apply only to principal remaining unconsumed at death of the life tenant, and that the principal of such a 'trust' is too indefinite to permit us to assign any value thereto for purposes of the marital deduction." But precisely the same objection existed in the case of the formal trust created by the will of Mr. Ellis. At the time of his death no one could foretell how much, if anything, would be left of the corpus of the trust at the death of Mrs. Ellis. If such indefiniteness does not prevent a formal trust from qualifying for the marital deduction, I see no reason why it should not be equally immaterial in the present case.

Judge Opper, who wrote the *Pipe Estate* opinion found it difficult to reconcile that decision with *Estate of Ellis* and dissented in the latter case. My brothers agree with his dissent rather than with the majority. I am unable to do so. In my opinion the marital deduction in the case at bar should be allowed under §812(e)(1)(F).

Appendix B.

Statute Involved.

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * *

(e) BEQUESTS, ETC., TO SURVIVING SPOUSE.—

(1) ALLOWANCE OF MARITAL DEDUCTION.—

(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) Life Estate or Other Terminable Interest.—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii))—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * *

(F) Trust with Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent in trust, if under the terms of the trust the surviving spouse is entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse—

(i) the interest so passing shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for the purposes of subparagraph (B) (i), be considered as passing to any person other than the surviving spouse.

This paragraph shall be applicable only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1007~~ 140

Estate of EDWARD F. PIPE, Deceased,
NETTIE M. PIPE, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1031

ESTATE OF EDWARD F. PIPE, DECEASED, NETTIE M. PIPE, EXECUTRIX,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONER.

I. Respondent bases his argument (Resp. Br. 4-8) that Mrs. Pipe's power to invade principal is not suffiiciently broad to meet the requirements of Section 812(e)(1)(F) of the Internal Revenue Code of 1939 on the erroneous assumption that it is a "power to withdraw the principal of the trust for personal consumption." (Resp. Br. 6.) The New York cases upon which he relies all involve such a limited type of power, namely, a power merely "to use" principal (*Matter of Lane*, 201 Misc. 1003; *Matter of Briggs*, 180 App. Div. 752) or a power "to invade principal if necessary" (*Manktelow* v. *Nevlezer*, 200 Misc. 536).

Obviously, a power limited to personal use or consumption is insufficient to satisfy the statute. But Mrs. Pipe has a much broader power. She is given (R. 27)

> "full power to use, enjoy, sell or dispose of"

the principal of her husband's residuary estate

> "*for such purposes or in such manner as she in her uncontrolled discretion may choose,* it being my desire to place *no restraint* on her in any respect *concerning the absolute right of full disposition* and use of the whole or any part"

of such principal, except that she has no power to dispose by will of any part of the principal which she has not consumed or disposed of during her life. Even less comprehensively phrased powers have been held to give a life tenant an unlimited and absolute right of disposition during his lifetime. *Seaward* v. *Davis,* 198 N. Y. 415; recently cited with approval in *In re Kelly's Will,* 137 N. Y. S. 2d 87 (1954).

The New York cases relied upon by respondent involve an entirely different type of power. They are irrelevant here and hence respondent's principal argument must fail. Respondent's statement that the court below recognized that Mrs. Pipe's power is not sufficiently broad to enable her to make a gift of the property *during her life* (Resp. Br. 8), is simply not so. The court below expressly stated (Pet. 17-18):

> "*During her lifetime,* no restraint whatsoever is imposed upon her power to consume or dispose of the principal of her life estate as she wishes." (Italics as in original.)

2. We can not agree with respondent's view as to the importance of the issue presented by this case. (Resp. Br.

9.) The court below denied the marital deduction because Mrs. Pipe does not have the power to dispose of principal both during her lifetime *and by will*. Section 812(e)(1)(F), we think, provides that a surviving spouse need have only one or the other power in order for the bequest to qualify for the deduction. We believe that the bar generally has so interpreted the statute and that the decision of the court below has caused doubt, confusion and grave concern.

Conclusion.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted;

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Counsel for Petitioner.

EDMUND W. PAVENSTEDT,
Of Counsel.

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No. ~~1081~~ 140

In the Supreme Court of the United States

OCTOBER TERM, 1956

ESTATE OF EDWARD F. PIPE, DECEASED, NETTIE M. PIPE, EXECUTRIX, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 31-40) is reported at 23 T.C. 99. The opinion of the Court of Appeals (Pet. 12-22) is reported at 241 F. 2d 210.

JURISDICTION

The judgment of the Court of Appeals affirming the Tax Court's decision was entered on February 7, 1957. (Pet. 12-22.) A petition for rehearing was

denied on March 4, 1957. The petition for a writ of certiorari was filed on May 27, 1957. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254.

QUESTION PRESENTED

The decedent bequeathed his residuary estate to his wife, giving her the right to the income for life and certain power with respect to the principal, any unconsumed portion of the principal to pass upon her death to named remaindermen. The question is whether the courts below erred in holding that the interest received by the wife did not satisfy the conditions of Section 812(e) of the Internal Revenue Code of 1939, and hence did not qualify for the marital deduction.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 812(e) of the Internal Revenue Code of 1939, and Treasury Regulations 105, Section 81.47a are set forth in the Appendix, *infra*, pp. 11-15.

STATEMENT

All of the facts were stipulated (R. 23-31), and may be summarized as follows:

Edward F. Pipe, the decedent, was a resident of New York who died on September 20, 1948. His last will and testament was admitted to probate on November 10, 1948. (R. 23, 32.) It provided, in part, as follows (R. 27-28):

> SECOND: I give, devise and bequeath to my wife, NETTIE M. PIPE, absolutely and forever, all real property, together with improvements thereon,

which I may own or to which I may be entitled at the time of my death, and all my personal effects, clothing, books, pictures, furniture, furnishings, household equipment and automobiles.

THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my "residuary estate", I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.

I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property.

FOURTH: On the death of my said wife if she survives me, first out of the property which can be identified as a part of my residuary estate, I

> give and bequeath * * * [to certain named remaindermen].

The value at the optional valuation date of the property passing under Article Third of the will was $217,429.84, all of which was included in the decedent's gross estate. (R. 26.)

In an opinion reviewed by the Tax Court, it was unanimously held that the interest received by the decedent's widow under Article Third of the will was a terminable interest and did not qualify for the marital deduction. (R. 32-40.)

The Court of Appeals, one judge dissenting, affirmed. (Pet. 12-22.)

ARGUMENT

There is no basis for further review of this case. The decision below, affirming that of the Tax Court, turns upon the provisions of a particular will and the applicable local law. The decision is correct, and it is not in conflict with that of any other Court of Appeals.

1. Section 812(e) of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 11-13), allows a deduction from the gross estate, in computing the federal estate tax, for certain gifts passing from a decedent to his surviving spouse. This so-called marital deduction, however, is not available for gifts of life estates and other "Terminable Interest[s]," defined in Section 812 (e)(1)(B) (Appendix, *infra*, pp. 11-12) as interests passing to the surviving spouse but which upon the lapse of time or the occurrence of a contingency will terminate and pass to any other person. There is no doubt that the interest of the surviving spouse in the

instant case (a life estate, coupled with a power to consume principal) will terminate upon her death and that the property will pass according to the decedent's will to the remaindermen named by him. Thus, the interest of the surviving spouse is a terminable interest for which no deduction is allowable unless it can qualify for deduction under Section 812(e)(1)(F) of the 1939 Code (Appendix, *infra*, pp. 12-13), which provides an exception to the terminable-interest rule.

Section 812(e)(1)(F) allows a deduction for interests passing from a decedent to his surviving spouse—

> in trust, if under the terms of the trust his surviving spouse is entitled for life to all the income from the corpus of the trust * * * with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or the estate of such surviving spouse, or in favor of either * * *) * * *.

The subparagraph is applicable, however—

> only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

Under the applicable Treasury Regulations (Treasury Regulation 105, Section 81.47a (Appendix, *infra*, pp. 13-15), the power possessed by the surviving spouse must be one "to appoint the corpus to herself as unqualified owner or to appoint the corpus as a part of her estate, that is, in effect, to dispose of it to whomsoever she pleases." The Court of Appeals, we submit, was correct in holding that the power given by the decedent to his wife, in the instant case, was not sufficiently broad to qualify for deduction under Section 812 (e)(1)(F) and the Regulations.

The wife's power to withdraw the principal of the trust for personal consumption is not, we submit, a power to appoint to herself free of the trust as unqualified owner. Indeed, under New York law there are severe restrictions on the wife's right to exercise such a power. Her power to consume corpus must be exercised by her only in good faith and honestly. She may not use it to defeat the intention of the testator that any property not personally needed by her during her life, shall, on her death, pass to remaindermen selected by him. Cf. *Matter of Lane*, 201 Misc. 1003, 1005. For example, under New York law, she may not exercise the power in order to found a charity, to give the principal to others, to give away her own property and live solely upon the principal of her husband's estate, or to so manage the property that it will pass to persons of her selection rather than those named by the decedent. *Matter of Briggs*, 180 App. Div. 752, 759, modified, 223 N.Y. 677. And even if the property is sold by her, the proceeds can be traced and the interests of the remaindermen will be protected. Cf. *Manktelow* v. *Nevlezer*, 200 Misc. 536. The primary purpose of the New York courts in such cases is to carry out the decedent's stated intention by protecting the remaindermen selected by him.[1]

The requirement in the Regulations that the surviving spouse have a power to appoint to herself free of the trust and as unqualified owner is, we think, in

[1] The taxpayer states (Pet. 6) that Mrs. Pipe is able to exercise the power by giving the property away, or by creating a trust reserving income for herself and providing for remainders on her death. No authority is cited for this assertion. We submit, on the basis of the cases cited above, that the New York courts would not allow the interests of the remaindermen to be defeated in such a manner.

accord with the congressional purpose in enacting Section 812(e)(1)(F). For only by possessing such a power, together with the right to all of the income for life, does the surviving spouse enjoy an interest which approaches that of a "virtual owner" of the property. S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 16 (1948-1 Cum. Bull. 331, 342). In a community property state each spouse is an absolute owner of one-half of the property owned by the marital community; on the death of one spouse the survivor is entitled to outright ownership of one-half of the community property and, accordingly, can dispose of it in any manner whatever. See *e.g.*, *Fernandez* v. *Wiener*, 326 U.S. 340, 348-350; *United States* v. *Rompel*, 326 U.S. 367, 369-370. The congressional purpose in equating estates of decedents in community property states with estates of other decedents through the marital deduction allowance is accomplished only if the surviving spouse acquires either an absolute fee simple interest (Section 812(e)(1)(A)), or an interest in trust which is tantamount to a fee simple interest (Section 812(e)(1)(F)). For this reason, the requirement in Section 812(e)(1)(F), that a wife who is life beneficiary of a trust have a power exercisable "in all events" to appoint the entire corpus to herself "free of the trust," must be interpreted so as to condition deductibility on the existence of an uncontrolled and unlimited right to appoint to herself as "unqualified owner * * * that is, in effect, to dispose of it to whomsoever she pleases." Treasury Regulation 105, Section 81.47a.[2] Recognizing that

[2] That the value of the unconsumed property might be includible in the wife's gross estate upon her death is no reason for construing the statute in such a manner as to allow a lesser power to qualify

the wife's power in the instant case is not tantamount to a fee simple interest (*Terry* v. *Wiggins*, 47 N.Y. 512; *Hasbrouck* v. *Knoblauch*, 130 App. Div. 378), and that the power to consume is not sufficiently broad to enable the wife to make a gift of the property either during her life or on her death, the Court of Appeals correctly affirmed the Tax Court's holding that the bequest of the decedent's residuary estate does not qualify for deduction under Section 812 (e)(1)(F) of the 1939 Code.

2. There is no conflict between the decision of the court below and that of any other Court of Appeals. It is true that the court below expressly disapproved what appears to be a contrary construction by the Tax Court of the requirements of Section 812(e)(1)(F) in *Estate of Ellis* v. *Commissioner*, 26 T.C. 694. A petition for review of that decision has been filed on behalf of the Commissioner and the case is now pending in the Court of Appeals for the Third Circuit. If the *Ellis* decision is reversed by the Third Circuit, no conflict will develop.[3] On the other hand, because of differences in the language of each of the wills in-

for the deduction. See *Starrett* v. *Commissioner*, 223 F. 2d 163, 166 (C.A. 1st); *Hoffenberg* v. *Commissioner*, 223 F. 2d 470 (C.A. 2d), affirming *per curiam* 22 T.C. 1185; *Shedd's Estate* v. *Commissioner*, 237 F. 2d 345 (C.A. 9th), certiorari denied, 352 U.S. 1024; *In re Sweet's Estate*, 234 F. 2d 401 (C.A. 10th), certiorari denied, 352 U.S. 878. Indeed, Congress specifically contemplated that such a situation might arise under the statute and enacted a provision designed to allow a credit in computing the estate tax of the spouse second to die in certain circumstances. See Section 814 of the 1939 Code, as added by Act of February 20, 1956, c. 66, 70 Stat. 26, Section 1; H. Rep. No. 1495, 84th Cong., 1st Sess. (1956-1 Cum. Bull. 948).

[3] The Commissioner's brief in the *Ellis* case has been filed in the Court of Appeals. The case will not be reached for argument before the next term of that court.

volved and because of possible differences in the applicable state law, an affirmance of the *Ellis* decision may not necessarily result in a conflict of decisions that would warrant consideration of the issue by this Court.[4]

3. This case does not have the importance which taxpayer seeks to attach to it. (Pet. 7-8.) Since the decision turns upon a proper interpretation of the terms of a particular will under the applicable state law (New York), it will not necessarily be controlling in other cases presenting a similar question.

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[4] Moreover, the decision in the case at bar is supportable on alternative grounds. Section 812(e)(1)(F) requires that a gift be made "in trust" for the surviving spouse. The decedent's residuary bequest was one of a *legal* life estate with remainders over, and it was the Commissioner's primary contention in the courts below that no trust in the statutory sense was created. Cf. *In re Walter's Will*, 141 N.Y.S. 2d 49; *Jacoby* v. *Jacoby*, 188 N.Y. 124, 129. The Tax Court agreed (R. 31-40), but the Court of Appeals did not pass upon this issue. Section 2056(b)(5) of the Internal Revenue Code of 1954 (26 U.S.C. 1952 ed., Supp. II, Sec. 2056) has changed the law in this respect and no longer requires that a gift be made *in trust*. See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A318 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4461).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE 1957.

APPENDIX

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) [As added by Sec. 361(a) of the Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of marital deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or

enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii))—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * *

(F) *Trust with Power of Appointment in Surviving Spouse.*—In the case of an interest in property passing from the decedent in trust, if under the terms of the trust his surviving spouse is entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse—

(i) the interest so passing shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for the purposes of subparagraph (B)(i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall be applicable only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * *

(26 U.S.C. 1952 ed., Sec. 812.)

Treasury Regulation 105, promulgated under the Internal Revenue Code of 1939:

Sec. 81.47a [as added by T.D. 5699, 1949-1 Cum. Bull. 181]. *Bequests, Etc., to Surviving Spouse.*—

* * * *

(c) *Trust with power of appointment in surviving spouse.*—In the case of property interests which passed from the decedent to a trust, the terms of which satisfy the five conditions stated in this paragraph, the expression "passed from the decedent to his surviving spouse" embraces not only the beneficial interest therein of such spouse but also the interest therein subject to her power to appoint. (As to the treatment of trusts not meeting such conditions, see paragraph (b)(2) of this section.) The five conditions which must be satisfied by the terms of the trust are as follows:

(1) The surviving spouse must be entitled for life to all the income from the corpus of the trust.

(2) Such income must be payable annually or at more frequent intervals.

(3) The surviving spouse must have the power, exercisable in favor of herself or of her estate, to appoint the entire corpus free of the trust.

(4) Such power in the surviving spouse must be exercisable by such spouse alone and (whether exercisable by will or during life) must be exercisable in all events.

(5) The corpus of the trust must not be subject to a power in any other person to appoint any part thereof to any person other than the surviving spouse.

In determining whether the above-stated conditions (1) to (5), inclusive, are satisfied by the terms of the trust, regard is to be had to the applicable provisions of the law of the jurisdiction governing the administration of the trust. * * *

* * * *

In order to satisfy conditions (3) and (4), the power of the surviving spouse to appoint the entire corpus free of the trust must fall within one of the following categories:

(i) A power so to appoint fully exercisable in her own favor at any time following the decedent's death (as, for example, an unlimited power to invade).

(ii) A power so to appoint exercisable in favor of her estate. Such power, if exercisable

during life, must be fully exercisable at any time during life, or, if exercisable by will, must be fully exercisable irrespective of the time of her death.

(iii) A combination of the powers described under (i) and (ii). For example, the surviving spouse may until she attains the age of 50 years have a power to appoint to herself and thereafter have a power to appoint to her estate. However, condition (4) is not satisfied unless irrespective of when the surviving spouse may die the trust corpus will at the time of her death be subject to one or the other such power.

The power in the surviving spouse must be a power to appoint the corpus to herself as unqualified owner or to appoint the corpus as a part of her estate, that is, in effect, to dispose of it to whomsoever she pleases. Thus, if the surviving spouse entered into a binding agreement with the decedent to exercise the power only in favor of their issue, condition (3) is not met. The trust will not be regarded as failing to satisfy condition (3) merely because takers in default of the surviving spouse's exercise of the power are designated by the decedent. The decedent may provide that, in default of exercise of the power, the trust shall continue for an additional period.

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